IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 491

ALBERT ANDREWS,

Petitioner,

vs.

UNITED STATES.

No. 494

ROBERT L. DONOVAN,

Petitioner,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The Court of Appeals rendered a single opinion in these cases reversing the orders of the District Court and direct-

ing that the resentencing petitions of both Andrews and Donovan be dismissed. The opinion of the Court of Appeals (R. 74-77)[1] is reported at 301 F.2d 376. The order of the District Court granting Donovan's motion to vacate his sentence and directing that he be returned to the Southern District of New York for resentencing (R. 40) is unreported. The order of the District Court granting Andrews' motion to vacate his judgment and directing that he be resentenced (R. 50) is also unreported.

Jurisdiction

The judgment of the Court of Appeals was entered March 23, 1962 (R. 78), and a petition for rehearing was denied on April 27, 1962 (R. 79). The orders granting the motions for leave to proceed *in forma pauperis* and granting the petitions for writs of certiorari were entered on October 8, 1962. 371 U.S. 812. The order in No. 491 appears at R. 80, and the order in No. 494 appears at R. 81.

The jurisdiction of this Court in both cases rests on 28 U.S.C. § 1254(1).

Constitutional Provision, Statutes and Rules Involved

The principal constitutional provision, statutes and rules involved are the Due Process Clause of the Fifth Amendment to the United States Constitution, 18 U.S.C. § 2114, 18 U.S.C. § 371, 28 U.S.C. § 2255, 18 U.S.C. § 3731, and Federal Rules of Criminal Procedure 32, 35 and 43, all of which are set out in Appendix A to this brief.

[1] The records for both Andrews and Donovan were consolidated and bore a single docket number throughout the proceedings below and have been consolidated in a single Transcript of Record in this Court.

Questions Presented[2]

No. 491

"1. Is a district court's order, which remands the case for resentencing, a final appealable judgment?

"2. When the district court denies a request for allocution at the sentence proceeding, is the sentence illegal and subject to collateral attack?

"3. When the district court fails to ask a Federal criminal defendant whether he had anything to say at the resentence proceeding, and resentences him under significant mistakes of fact, is the sentence illegal and subject to collateral attack?"

No. 494

I.

"(a) After a district court sets aside sentence (but not conviction) under Rule 32(a) of the Federal Rules of Criminal Procedure, and before re-sentence, can the Government appeal the District Court's order?

"(b) Whether a successful attack on a sentence is immune to Government appeal until the re-sentence which makes the judgment final is imposed?

II.

"Whether an attack on a sentence (not the conviction) pursuant to Rule 32(a), Fed. Rules Crim. Proc., is a direct attack—as Courts of Appeal hold under Rule 32(d)—or a collateral attack?"

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[2] The questions presented are set forth here as they appeared in the petitions for writs of certiorari filed by Andrews and Donovan *pro se*, prior to the appointment of their present attorney by this Court. 371 U.S. 812, 885 (1962).

III.

"Where the sentencing minutes clearly show the facts to be as claimed by petitioner, and the District Court granted petitioner's motion on such facts, and the Court of Appeals read the record incorrectly, and reversed the District Court on such incorrect reading, and the Court of Appeals denied rehearing to correct its obvious errors of fact, did the Court of Appeals depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision?"

Statement of the Case

Andrews, Donovan and one Hyman Cohen were found guilty in the United States District Court for the Southern District of New York on December 31, 1954, on a three-count indictment charging that they (1) assaulted a Post Office employee with intent to rob in violation of 18 U.S.C. § 2114, (2) put the life of the Post Office employee in jeopardy by the use of a dangerous weapon in violation of 18 U.S.C. § 2114, and (3) conspired together to violate the aforesaid statute in violation of 18 U.S.C. § 371 (R. 12-15). Each defendant was sentenced to a prison term of 25 years on Count Two and five years on Count Three, the sentences to run concurrently. No sentence was imposed on Count One, because Count One was deemed to have merged into Count Two upon conviction on both counts (R. 16-19). Neither Andrews nor Donovan was asked at the time of sentencing whether he had anything to say in his own behalf or in mitigation of sentence (Original Transcript on file with this Court, Appendix B to this brief).

The Second Circuit Court of Appeals affirmed the convictions but remanded the case for resentencing of all three defendants on Count Two, holding that the District Court

was in error in thinking that it had no power to suspend sentences on that count. *United States* v. *Donovan*, 242 F.2d 61 (2d Cir. 1957).

On May 15, 1957, Jacob W. Friedman, Esq., representing all three defendants (R. 20), appeared before the Honorable Lawrence E. Walsh, District Judge. The court minutes indicate that Frank A. Healey, Esq., was also present representing Mr. Donovan (R. 20). Mr. Friedman asked that resentencing be deferred so that he would have an opportunity to prepare a brief regarding the extent of the Court's power in resentencing the defendants (R. 20-21), and the Court deferred resentencing for five days (R. 21).

On May 20, 1957, at 2:30 p.m., the case was called, and the Assistant United States Attorney and Mr. Friedman announced that they were ready (R. 21). The record indicates that Mr. Healey, the attorney for Donovan, was not present at this time.[3] The following colloquy took place:

> The Court: Are the defendants present?
>
> Mr. Friedman: I understand that they are on their way up, your Honor.
>
> The Court: All right.
>
> Mr. Friedman: I am sorry, your Honor, but I did not have the opportunity, as I was away for a few days, to prepare a memorandum of law.
>
> The Court: Yes. [R. 21.]

Despite the absence of the defendants and Mr. Healey, Mr. Friedman then presented an extended legal discussion of the law in regard to sentencing. The purport of the first

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[3] After the Assistant United States Attorney and Mr. Friedman addressed the court, a recess was taken. When the Court resumed its session, Mr. Friedman stated: "If your Honor please, Mr. Frank Healey *is now present* and he will also say something on behalf of the defendant Donovan * * * " (R. 26, emphasis added).

part of his argument was that Counts One and Two were separate offenses and did not necessarily merge (R. 21-22), the point being that the District Court should grant a light sentence on Count One and suspend sentence on Count Two. He stated no grounds at this time for suspending sentence on Count Two except that, "With regard to the prospective cases, the District Attorney, I understand, your Honor has comprehensive reports concerning their families and their background" (R. 23).[4] Mr. Friedman pointed out for the second time that he represented all three defendants, although they were "differently situated" (R. 23). He concluded by stating that the five-year sentence on Count Three "remains unaffected" (R. 24).[5]

The Court indicated that it understood Mr. Friedman's "point on the law" (R. 24).

Mr. Matthews, the Assistant United States Attorney, then asked to be heard, and he presented his argument that there was a merger as to Counts One and Two, that the Court was limited in regard to Count Two to giving the defendants either suspended sentences or resentences of 25 years, and that the Court could not resentence on Count Three (R. 24-25).

The Court then stated: "Well, I think that this is about as far as we need go now *without the defendants being present*. Therefore we will take a short recess on this matter and go ahead with the Hudson & Manhattan [case]

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[4] The reporter's punctuation makes it unclear whether Mr. Friedman was saying that the District Attorney was in possession of reports, or that the District Attorney had indicated His Honor was in possession of reports. Apparently the latter was the case (see R. 26).

[5] A time check on the reading of Mr. Friedman's statement indicates that he spoke for some seven minutes out of the presence of the defendants.

until the defendants are brought up here and are present" (R. 25, emphasis added). A short recess was taken.

Following the recess, the following colloquy took place:

> The Clerk: United States v. Donovan and others.
> The Court: Are all of the defendants present now?
> The Clerk: Yes, sir.
> The Court: Is there anything you want to say now?
> Mr. Matthews [the Assistant United States Attorney]: Yes, your Honor. As your Honor is aware, this involves the resentencing of the three defendants, Donovan, Andrews and Cohen, and as your Honor was the trial judge in this matter I don't think it is necessary to go into detail as to the facts except in a very, very general way. [R. 25.]

The Assistant United States Attorney continued with a capsule version of the crime. He stated: "The Government does not have much information on the background of these individual defendants, your Honor, but I notice that you have a presentence report. However, if you want any additional information I will be glad to attempt to supply it" (R. 26).

Without specifically being asked to speak by the Court, Mr. Friedman then noted the presence of Mr. Healey and gave a statement first on behalf of Mr. Cohen and then on behalf of Mr. Andrews (R. 26-28), noting that "the best possible sentence for any defendant is the least sentence that is consonant with justice and fairness * * * " (R. 27).

Mr. Friedman was followed by Mr. Healey, who spoke on behalf of Mr. Donovan. Mr. Healey mentioned probation several times but also said, "There must be some punishment, there is not any doubt in my mind about that" (R. 29).

Without affording the defendants an opportunity to make statements in their own behalf or to present information in mitigation of punishment, Judge Walsh proceeded immediately to make a statement and to sentence the defendants. During the course of his statement, Judge Walsh showed that he was under a misapprehension as to the part played by Andrews in the crime.[6] He suspended Mr. Cohen's 25-year sentence and placed him on probation for five years, to begin upon termination of his sentence on Count Three (R. 4, 31). Judge Walsh "resentenced" Andrews and Donovan to 25-years' imprisonment on Count Two (R. 4, 31-34).

The Court of Appeals reaffirmed the judgments of conviction as to Andrews and Donovan, *United States* v. *Donovan*, 252 F.2d 788 (2d Cir. 1958), and this Court denied certiorari, *Andrews* v. *United States*, 357 U.S. 940 (1958); *Donovan* v. *United States*, 358 U.S. 851 (1958).

On April 17, 1961, Donovan filed a motion pursuant to Federal Rule of Criminal Procedure 35 (R. 35, 37, 38, 39; see R. 41, 45, 48) to vacate his sentence on Count Two and to resentence him because he had been denied his right of allocution under Federal Rule of Criminal Procedure 32 (a) at the time of both his original sentencing and his resentencing (R. 3[illegible]).

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[6] Judge Walsh thought that Andrews was on the truck with Donovan when the crime was committed. Thus, he referred to "• • • Donovan or Andrews • • • the two men who perpetrated the holdup of the truck • • •" (R. 31); "• • • if you [Cohen] had been with the other two on the truck I would not suspend your sentence" (*ibid.*); "If you [Cohen] had been there I would have imposed the same sentence • • •" (*ibid.*); "• • • in the case of the two men who have committed the holdup • • •" (R. 32). Actually, Andrews was away from the truck and unarmed during the holdup. See *United States* v. *Donovan*, *supra*, 242 F.2d at 62; Government's Brief in Opposition, *Andrews* v. *United States*, No. 992 Misc., October 1959 Term, p. 2; Government's Brief in Opposition, *Donovan* v. *United States*, No. 97 Misc., October 1958 Term, p. 7.

On June 16, 1961, Judge Thomas F. Murphy ordered: "Defendant's motion is granted and it is ordered that he be returned to this district for resentencing. * * * This is an order. No settlement is necessary" (R. 40).

On June 25, 1961, Andrews wrote to Judge Murphy that since his circumstances had been identical with those of Donovan, "I very respectfully request that this Honorable Court vacate my judgment" (R. 49-50). Neither the letter nor the docket entry made any mention of Rule 35 or 28 U.S.C. § 2255 (R. 10, 49-50). In an affidavit filed by an Assistant United States Attorney in opposition to Andrews' request, it was conceded that "The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan" (R. 50-51). Nevertheless, the Assistant United States Attorney treated Andrews' request as "in the nature of an application to vacate the sentence under Title 28, United States Code, Section 2255" (R. 51).

On July 18, 1961, Judge Murphy issued an order in the *Andrews* case which read: "Motion granted. Let the defendant be resentenced" (R. 50).

The Government sought a stay of Judge Murphy's resentencing orders on the ground that a timely appeal would be taken to the Court of Appeals (R. 47, 53-58). In sworn affidavits supporting the applications for a stay, an Assistant United States Attorney stated: "Unless Judge Murphy's order is stayed, the proceedings will be mooted and the Government will be denied appellate review of the substantial legal issues" (R. 54, 57). Judge Murphy granted a stay of both his orders (R. 46, 55, 58).

The Government appealed (R. 48-49, 52), and the Court of Appeals deferred decision on motions to dismiss filed

by Andrews and Donovan (R. 59-61, 65-67).[7] On March 23, 1962, the Court of Appeals, in an opinion written by Judge Waterman and joined in by Judge Smith (Judge Marshall concurred in the result), held that it had jurisdiction over the Government's appeals, that the District Court had erroneously granted the petitions for resentencing, and that the petitions therefore must be dismissed by the District Court (R. 74-77). The holding that the Court of Appeals had jurisdiction was based on the assumption that the District Court could not have granted relief under Rule 35, that the petitions were more properly claims under 28 U.S.C. § 2255, and that the Government could appeal adverse decisions under § 2255 (R. 77). The ruling that the District Court erroneously granted the petitions for resentencing was based upon the following statement of what occurred at the resentencing:

> The undisputed facts are that when the case was called for sentence Donovan was present with his retained counsel; that the court inquired: "Is there anything you want to say now?"; and that thereupon in the presence of Donovan his counsel addressed the court at length. [R. 75.]

The Court held that under these circumstances, this Court's decisions in *Hill* v. *United States*, 368 U.S. 424 (1962), and *Machibroda* v. *United States*, 368 U.S. 487 (1962), required reversal (R. 75-76).

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[7] In his motion to dismiss the appeal, Andrews specifically asserted that he neither requested nor desired that his application for resentencing be treated as a petition under 28 U.S.C. § 2255, but rather that it should be treated as a motion under Rule 35 (R. 66).

Summary of Argument

There are three independent and compelling reasons why the Court of Appeals should be reversed:

1. Petitioners' prior sentences have been vacated, and the resentencing ordered by the District Court has yet to take place. Therefore, whether the District Court's orders are considered part of the criminal case or part of a separate proceeding, they were entirely interlocutory and nonfinal in both form and substance. Such orders may not be appealed in criminal cases (*DiBella* v. *United States*, 369 U.S. 121 (1962); *Carroll* v. *United States*, 354 U.S. 394 (1957)), or in proceedings under 28 U.S.C. § 2255. *Collins* v. *Miller*, 252 U.S. 364 (1920); 28 U.S.C. §§ 2253, 2255. This is particularly true where the Government is the appellant.

2. Even if considered final, the District Court's orders were not appealable, since they were entered—and properly so—pursuant to Federal Rule of Criminal Procedure 35 and were part of the criminal case. The only final appeals allowed the Government in criminal cases are those specifically enumerated in 18 U.S.C. § 3731. The Government's appeals in this case did not fall within § 3731.

3. Even if the District Court's orders were appealable, they were correctly entered. Petitioners are entitled to be resentenced not only because they were denied their right of allocution but also because a number of aggravating circumstances accompanied the denial. See *Hill* v. *United States*, 368 U.S. 424 (1962); *Green* v. *United States*, 365 U.S. 301 (1961). Not the least of these circumstances was the absence from the courtroom of petitioners and a defense attorney during a vital part of the sentencing procedure.

ARGUMENT

I.

The orders of the District Court were entirely interlocutory and non-final, and the Court of Appeals lacked jurisdiction over them.

The orders of the District Court directing that petitioners be resentenced—whether viewed as part of the criminal case (see II, *infra*) or as part of an independent civil proceeding, and whether entered correctly (see III, *infra*) or erroneously—were non-final, interlocutory orders which the Court of Appeals had no jurisdiction to review on appeal.

The jurisdiction of the Court of Appeals is limited to "final decisions" of the District Court in virtually all civil and criminal cases (28 U.S.C. § 1291), to "the final order" of the District Court in habeas corpus cases (28 U.S.C. § 2253), and to orders "entered on the motion as from a final judgment on application for a writ of habeas corpus" in proceedings under 28 U.S.C. § 2255. A final order generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment.[8]

In a criminal case, final judgment means sentence. Thus, in *Parr* v. *United States*, 351 U.S. 513, 518 (1956), this Court said:

> In general, a "judgment" or "decision" is final for the purpose of appeal only "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." * * * This rule applies in criminal as well as civil cases. * * *

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[8] *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 10 (1882); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940); *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

> It is argued that the order dismissing the Corpus Christi indictment was "final" because it (a) terminated the prosecution under that indictment, and (b) cannot be reviewed otherwise than upon this appeal. We think neither point well taken. "Final judgment in a criminal case means sentence. The sentence is the judgment." * * *

And in *In re Eskay*, 122 F.2d 819 (3d Cir. 1941), Eskay was found guilty of criminal contempt and appealed prior to sentencing. The court held that the appeal would not lie:

> Judicial punishment, by definition, is a matter of judicial discretion. It can have no finality, therefore, until sentence is imposed. There is no dissent in the authorities. * * * The question being one of appellate jurisdiction it is, like all questions of jurisdiction, quite dehors action by the parties. * * * We either have or we haven't, and not having cannot act accordingly. There having been no sentence in the case at bar, the appeal must be dismissed. [*Id.* at 824.]

Similar rulings—that "judgment" in a criminal case means "sentence," and that there is no finality until sentence—are found throughout the cases.[9]

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[9] *E.g.*, *Berman* v. *United States*, 302 U.S. 211, 212 (1937) ("* * * Final judgment in a criminal case means sentence. The sentence is the judgment. * * * To create finality it was necessary that petitioner's conviction should be followed by sentence * * *"); *Alexander* v. *United States*, 201 U.S. 117, 122 (1906) ("This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit"); *Miller* v. *Aderhold*, 288 U.S. 206, 210 (1933) ("In a criminal case final judgment means sentence * * *"); *Massengale* v. *United States*, 278 F.2d 344, 345 (6th Cir. 1960) ("'Final judgment in a criminal case means sentence.' * * * In the absence of a sentence * * *, the decision lacks the finality which would allow this court to review it"). See also

The orders of the District Court directing that the petitioners be resentenced are almost classic examples of the interlocutory, non-final, non-appealable orders to which these cases refer.

The District Court granted Donovan's motion to *vacate* his sentence and ordered that he be returned to the Southern District of New York for resentencing (R. 35, 40). The order was self-executing, requiring no settlement (R. 40). Thus, Donovan's prior sentence was rendered null and void, and no new sentence was imposed; until resentencing, he stood in the shoes of any defendant who has been convicted but who has not yet been sentenced.

As to Andrews, the Government conceded that "The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan" (R. 51). The Court granted Andrews' application and ordered that "the defendant be resentenced" (R. 50). Andrews, like Donovan, was thus without a sentence as a result of the Court's order. The order as to him, like the order as to Donovan, did not put an end to any phase of the case, for it was in two parts. The first rendered void that which had gone before; the second directed that a further step be taken in the future. Until that step was taken, no result was reached, no injury done, no end accomplished.

This Court has stated many times the policy reasons why interlocutory appeals in situations such as this cannot be

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Pollard v. *United States*, 352 U.S. 354, 358 (1957); *Hill* v. *United States ex rel. Wampler*, 298 U.S. 460, 464 (1936); *United States* v. *Brown*, 301 F.2d 664, 665 (4th Cir. 1962); *Northern* v. *United States*, 300 F.2d 131, 132 (6th Cir. 1962); *Gilmore* v. *United States*, 264 F.2d 44, 45 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959); *United States* v. *Swidler*, 207 F.2d 47, 48 (3d Cir.), *cert. denied*, 346 U.S. 915 (1953); *United States* v. *Knight*, 162 F.2d 809, 810 (3d Cir. 1947); *In re Eskay*, *supra*, 122 F.2d at 824; *In re Ringnalda*, 48 F. Supp. 975, 977 (S.D. Cal. 1943).

allowed. Not only do general principles of federal appellate jurisdiction require that review await final judgment, but insistence on finality has been found the only practical way to "discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. 121, 124 (1962). " • • • Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325. All of the policy considerations pointed out in civil cases have been held particularly applicable to the criminal field (*DiBella* v. *United States*, *supra*, at 126; *Parr* v. *United States*, *supra*, 351 U.S. at 518-521), and even more applicable to the Government than to private parties. *Carroll* v. *United States*, *supra*, 354 U.S. at 400, 405, 406.

The wisdom of the rule against piecemeal, interlocutory appeals is particularly evident in the instant case. Upon resentencing, the District Court may, of course, place petitioners on probation or give them lesser sentences; but it is also possible that their sentences could remain the same, in which event the Government would in no way be prejudiced by the resentencing. In effect, then, the Government is seeking to appeal on the *possibility* that the District Court may in the future treat petitioners more leniently than they have been treated to date.[10]

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[10] The situation is analogous to that in *Cogen* v. *United States*, 278 U.S. 221 (1929), where the court held that orders denying motions to suppress evidence were not appealable and pointed out to the defendants that if they renewed their objection at trial, it might be sustained, in which event they would not have been hurt (*id.* at 224).

Similarly, in *Marion* v. *United States*, 164 F.2d 158 (9th Cir. 1947), the defendant moved for a new trial following his conviction and also for the appointment of counsel and for his own at-

In the meantime, while the Government seeks its review, based on a contingency, it is defeating the very right which petitioners seek to protect. Judge Murphy granted Donovan's motion for resentencing on June 19, 1961, and Andrews' motion on July 18, 1961, which means that there was a judicial determination more than a year and a half ago that these defendants were entitled as a matter of law to be resentenced. Yet they still have not been resentenced. For a year and a half they have served time in prison which they might well have spent on probation if the Government had not been allowed to appeal. Not only are Andrews and Donovan adversely affected, but if an interlocutory appeal lies in this case, the Government can hereafter use its appeal as a weapon and completely destroy the right of resentencing for any prisoner serving a minimum term of a year or two's duration. We have here not only delay in the final disposition of a criminal case but the use of delay to frustrate or obviate the very right sought to be protected.

Nor is delay the only burden involved. An indigent defendant granted the right to be resentenced and confronted by a Government appeal must face all of the problems incident to a *pro se* representation or to the appointment of an unknown attorney. This case illustrates the problems, because Andrews and Donovan were not represented by counsel before the Court of Appeals (R. 74), and they are represented before this Court by an appointed counsel whom they have never seen. Andrews' motion to be transferred to New York so that he could prepare for his appeal and "consult counsel" was denied (R. 62-63), and both he and

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tendance at the argument on his motion. The District Court denied the applications for an attorney and for the defendant's appearance. The Court of Appeals held that no appeal would lie from this decision. The right of counsel, as important as it was, did not supply finality, and the District Court might *grant* a new trial, in which event the defendant would have no need to appeal.

Donovan were forced to submit the case on papers prepared by themselves (R. 74). The attorney appointed by this Court has not had the invaluable advantage of personal communication with his clients, for the appeals are being heard in New York and Washington, whereas the petitioners are confined in Lewisburg, Pennsylvania, and Alcatraz, California.

For prisoners who are able to afford an attorney, an appeal by the Government means time, expense and labor which could better be spent preparing for the resentencing. It is true, of course, that "bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325. But bearing the expense of a trial is one thing; it is quite another to bear the expense of defending a totally unnecessary appeal by the Government in a situation where the Government might prevail even if there is no appeal.

It is no answer that the Government believes Judge Murphy was in error in ordering resentencing.[11] If the Government can appeal in this case, it can appeal every order of resentencing, right or wrong, and thereby postpone resentencing for months or even years as a result of the delay inherently involved in the appellate process. In the meantime, what is the effect on the prisoner? If the Government's argument prevails that this is a § 2255 proceeding (see II, *infra*), the prisoner is denied bail during the entire course of the appellate proceedings on the theory that the bail provisions of the criminal appeals statute do not apply. That is precisely the argument used by the

[11] This would not be the first case where an appellate court was in disagreement with a District Court and yet recognized that no appeal would lie. See, *e.g.*, *United States* v. *Williams*, 227 F.2d 149, 151 (4th Cir. 1955); *Collins* v. *United States*, 148 F.2d 338 (9th Cir. 1945).

Government in this very case to prevent Andrews and Donovan from being released on bail while the Government took its appeal (R. 71-73).[12] If the Government loses before the Court of Appeals, it can cause further delay by seeking certiorari from this Court; and if the Government wins before the Court of Appeals, the defendant then has the unpleasant choice of giving in or attempting to petition for certiorari himself—as in this case. It is not inappropriate to point out that if Andrews and Donovan are finally resentenced, the resentencing in all probability will not take place until two years after their resentencing was ordered. The Government's appeal has truly become "an instrument of harassment." See *DiBella* v. *United States*, *supra*, 369 U.S. at 129.

The Assistant United States Attorney told the District Court under oath that the Government must be allowed to appeal because otherwise it would be denied all appellate review of the legal issues involved (R. 54). Even assuming that this were true,[13] it is no ground for an interlocutory appeal. The same argument by the Government has been rejected time and again, by this and other courts.

For example, in *Carroll* v. *United States*, *supra*, 354 U.S. 394, the Government argued to this Court in its brief on the merits (pages 38, 40):

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[12] Most appropriate is this Court's observation in another case: "It is evident, for example, that the form of independence has been availed of on occasion to seek advantages conferred by the rules governing civil procedure, to the prejudice of proper administration of criminal proceedings." *DiBella* v. *United States*, *supra*, 369 U.S. at 129 n. 8.

[13] It is not necessary for petitioners to take a position at this time as to whether the Government could or could not appeal *following* resentencing. It should be noted, however, that the statement sworn to by the Assistant United States Attorney is diametrically opposed to that successfully taken by the Government in *United States* v. *Williamson*, 255 F.2d 512 (5th Cir. 1958), *cert. denied*, 358 U.S. 941 (1959).

> The decision rendered in the instant case provides a clear example of the impossibility not only of securing effective review except by the appeal here under attack, but of securing other review of any kind: for the Government obviously cannot appeal from either an acquittal or a conviction obtained without the suppressed evidence. * * *
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> * * * * * *
>
> If there were no reason other than that the only review of the District Court decision that could ever be had is the review procedure here employed, a ruling declaring that decision to be a final one would be amply justified.

But the Court rejected the argument with this statement: "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case * * *." 354 U.S. at 406.

In *DiBella* v. *United States*, *supra*, 369 U.S. 121, the Government attempted to appeal from an order suppressing evidence after the defendant was indicted in another jurisdiction. The Government's principal argument was that if it could not appeal the order, "it may be forever deprived of questioning the validity of the order. * * * [The Government] will not have another opportunity to obtain review."[14] The Court specifically ruled that this fact made no difference.

> Nor are the considerations against appealability made less compelling as to orders granting motions to

[14] The *DiBella* opinion encompassed two cases. One of them appeared in the Court of Appeals as *United States* v. *Koenig*, 290 F.2d 166 (5th Cir. 1961). The argument by the Government quoted above appears in the *Koenig* opinion at 171, 174.

> suppress by the fact that the Government has no later right to appeal when and if the loss of evidence forces dismissal of its case. * * * What disadvantage there be springs from the historic policy, over and above the constitutional protection against double jeopardy that denies the Government the right of appeal in criminal cases save as expressly authorized by statute. [369 U.S. at 130.]

And in *United States* v. *Rosenwasser*, 145 F.2d 1015 (9th Cir. 1944), the Court of Appeals said:

> The suggestion is made that a dismissal of the appeal herein might forever deprive the government of questioning the suppression rule because of the government's limited appellate rights in a criminal case. The reasoning is not persuasive, for the government's position herein is no less favorable than in the usual case of an adverse ruling on a point of evidence during a criminal trial, from which ruling the government would have no immediate, and possibly no future, right of appeal. [*Id.* at 1018, footnote deleted.]

These rulings are particularly impressive in view of the fact that the actual effect of the orders there involved was to put an end to the cases, whereas here the resentencing has yet to take place.

Even if petitioners' motions had been made under § 2255 —which they were not—the Government could not appeal, for this statute does not allow an appeal prior to finality. Section 2255 provides that an appeal may be taken "as from a *final* judgment on application for a writ of habeas corpus" (emphasis added), and only a "final" order in a habeas corpus proceeding may be appealed. 28 U.S.C. § 2253; *United States* v. *Hayman*, 342 U.S. 205, 209 n. 4 (1952); *Collins* v. *Miller*, 252 U.S. 364 (1920); *United*

States ex rel. Zdunic v. *Uhl*, 137 F.2d 858, 860 (2d Cir. 1943). The *Collins* case is very much in point here. The District Court had denied an application for a writ of habeas corpus based on the first of three affidavits but granted writs based on the last two affidavits and remanded the defendant to custody to await further hearings. The defendant attempted to appeal. This Court pointed out that the denial "would obviously have been a final judgment, if it had stood alone" (*id.* at 368), but since a further hearing was to be held based on the remaining affidavits, no appeal would lie. The rule as to finality "requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved" (*id.* at 370).

Similarly, in *Poe* v. *Gladden*, 287 F.2d 249 (9th Cir. 1961), the Court said: "The order of September 28, 1959, here sought to be reviewed did not terminate the habeas corpus proceeding. There is still pending before the district court the application which was filed on June 4, 1958, at the same time that Poe filed the supplemental application which was denied. The district court may have intended to dispose of both applications in the order of that date. But the order does not so state, and it was not so understood by Poe" (*id.* at 250). The appeal was dismissed. And in *Kellner* v. *Metcalf*, 201 F.2d 838 (9th Cir. 1953), a petition for a writ of habeas corpus was granted, but no judgment was ever signed, filed or entered. The Court of Appeals held that no appeal would lie.

The point is again illustrated by *United States ex rel. D'Amico* v. *Bishopp*, 286 F.2d 320 (2d Cir.), *cert. denied sub nom. Farace* v. *D'Amico*, 366 U.S. 963 (1961). There, D'Amico filed for a writ of habeas corpus following extradition proceedings. The District Court held that the Commission had failed to make certain essential findings

and remanded the case to the Commissioner for the receipt of further evidence. The Italian Consul General attempted to appeal. The Court of Appeals dismissed the appeal on the ground that the order was entirely non-final and non-appealable.

The difference between a final order and a non-final order, *both* of which grant a § 2255 motion, is illustrated by a comparison of this case with *United States* v. *Williamson*, *supra*, 255 F.2d 512. There, a defendant was sentenced to 20 years on Count Two of an indictment and to eight years each on Counts Five and Six, the latter two sentences to run concurrently following the completion of the 20-year sentence. Subsequently, and in reliance on an opinion by this Court, the defendant moved under § 2255 to vacate the 20-year sentence as not being authorized by law. The District Court granted the motion and vacated the sentence on Count Two. As the Court of Appeals put it: "This left only the concurrent sentences under Counts 5 and 6 for the consummated larcenies. The result was that instead of sentences aggregating twenty-eight years, Williamson now stood sentenced for eight years only * * *." *Id.* at 513.

Nothing remained to be done by the District Court. The 20-year sentence had not been vacated preparatory to resentencing; it was simply vacated. Williamson remained under sentence of eight years. All proceedings in the District Court were concluded, and the only remaining act to be performed by anyone was for Williamson to serve his outstanding sentence. The Government, therefore, was allowed to appeal.

In the instant case, on the other hand, the sentences have been vacated and resentencing ordered. Neither Andrews nor Donovan is under any sentence at all at this time (except by virtue of the stays issued to allow

the Government to appeal). Resentencing has not taken place—no more here than if petitioners had never been sentenced at the conclusion of their trial. Clearly, the District Court's orders are not "final" in any sense contemplated by the statute and by this Court's decisions. Thus, what the Government is seeking is even more latitude to appeal than is granted private parties, whereas this Court has said it has less. See, *e.g.*, *Carroll* v. *United States*, *supra*, 354 U.S. at 400; *DiBella* v. *United States*, *supra*, 369 U.S. at 130.

"[T]here is no [general] authority today for interlocutory appeals" (*Carroll* v. *United States*, *supra*, 354 U.S. at 406), and the fact that this is particularly applicable to the Government in criminal cases unless specifically authorized by statute has been emphasized again and again. See *DiBella* v. *United States*, *supra*, 369 U.S. at 124, 131, 133.

Thus, in *United States* v. *Lias*, 173 F.2d 685 (4th Cir. 1949), the District Court vacated the defendant's judgment and sentence, and allowed him to plead not guilty and to stand trial. Before trial, the Government attempted to appeal. The Court of Appeals dismissed, holding that no appeal would lie except from "a final judgment which puts an end to the proceeding * * *" (*id.* at 688). Again, in *United States* v. *Shapiro*, 222 F.2d 836 (7th Cir. 1955), the Court of Appeals dismissed an appeal by the Government from an order setting aside a judgment of conviction and allowing the defendant to withdraw his plea of *nolo*. The order did not constitute a final, appealable judgment. *Id.* at 838.

In *United States* v. *Nardolillo*, 252 F.2d 755 (1st Cir. 1958), the District Court dismissed the indictment because the Government refused to produce certain reports. The Court of Appeals dismissed the Government's appeal. The

Court held that if the order was intended to dispose of the case, it did not fall within the appealable orders specified in 18 U.S.C. § 3731, and if the District Court intended to allow the Government to try the defendant again, the order was interlocutory, and there is no authority for interlocutory appeals in criminal cases. *Id.* at 757-758. And in both *United States* v. *Williams*, *supra*, 227 F.2d 149, and *United States* v. *Rosenwasser*, *supra*, 145 F.2d 1015, the Courts of Appeals dismissed appeals from orders suppressing evidence on the ground that the Government cannot appeal from interlocutory orders.

The inflexibility of the rule against interlocutory appeals is emphasized by the *single* exception to it sanctioned by this Court. In *Stack* v. *Boyle*, 342 U.S. 1 (1951), a defendant was allowed to appeal an order refusing to reduce excessive bail in advance of trial. The theory of the majority was that the District Court was without discretion to refuse to reduce such bail—a theory totally inapplicable to the facts of this case. See *Carroll* v. *United States*, *supra*, 354 U.S. at 403-406. Other exceptions—to the effect that motions for the suppression of evidence are appealable when filed prior to indictment or in a different district from that in which the trial will be held—were overruled in *DiBella* v. *United States*, *supra*, 369 U.S. 121.[15] *No* exception allowing the Government to appeal interlocutory orders is recognized in any of this Court's current de-

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[15] Overruling the decisions in *Perlman* v. *United States*, 247 U.S. 7 (1918), and *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), and *dicta* in *Carroll* v. *United States*, *supra*, 354 U.S. 394; *Cobbledick* v. *United States*, *supra*, 309 U.S. 323; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931); and *Cogen* v. *United States*, *supra*, 278 U.S. 221. The appeal allowed the defendant in *Korematsu* v. *United States*, 319 U.S. 432 (1943), was not interlocutory. The District Court had suspended the imposition of sentence and placed the defendant on probation, so that all court proceedings had come to an end.

cisions, and the history of the interlocutory-appeal rule has been one of restriction and not expansion. Certainly no expansion should be allowed when the subject matter of the order is as intimately tied in with the mainstream of the criminal trial as the sentence.[18]

It is not too much to say that if this Court sanctions the Government's appeal from Judge Murphy's orders, the entire run of cases denying appeals by *defendants* from interlocutory orders will be placed in doubt. Orders such as those:

—denying a motion to suppress evidence filed prior to an indictment. *DiBella* v. *United States*, *supra*, 369 U.S. 121.

—denying a motion to suppress evidence filed after indictment or information but prior to trial. *Cogen* v. *United States*, *supra*, 278 U.S. 221; *Saba* v. *United States*, 282 F.2d 255 (5th Cir. 1960), *cert. denied*, 369 U.S. 837 (1961); *Zacarias* v. *United States*, 261 F.2d 416 (5th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

—denying a motion to dismiss an indictment. *United States* v. *Foster*, 278 F.2d 567, 569 (2d Cir. 1960), *cert. denied*, 364 U.S. 834 (1960); *United States* v. *Golden*, 239 F.2d 877 (2d Cir. 1956); *Atlantic Fishermen's Union* v. *United States*, 195 F.2d 1021 (1st Cir. 1952).

—transferring a case for trial from one jurisdiction to another. *Galloway* v. *United States*, 302 F.2d 457 (10th Cir. 1962); *United States* v. *Brown*, *supra*, 301 F.2d 664.

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[18] To paraphrase what this Court said in regard to suppression orders in *Carroll* v. *United States*, *supra*, 354 U.S. at 405, to fit an order granting resentencing in a criminal case "into the category of 'final decisions' requires a straining that is not permissible in the light of the principles and the history concerning criminal appeals, especially Government appeals * * *."

—denying a motion for a stay of criminal proceedings. *Dowling Bros. Distilling Co.* v. *United States*, 153 F.2d 353, 356 (6th Cir.), *cert. denied*, 328 U.S. 848 (1946); *United States* v. *Horns*, 147 F. 2d 57 (3d Cir. 1945).

—denying a motion for a new trial and in arrest of judgment prior to sentencing. *United States* v. *Knight*, *supra*, 162 F.2d 809.

—denying a motion for the appointment of an attorney pending a motion for a new trial. *Marion* v. *United States*, *supra*, 164 F.2d 158.

—deferring sentence on a criminal contempt charge. *Massengale* v. *United States*, *supra*, 278 F.2d at 345.

—overruling a motion for a judgment of acquittal and granting a retrial. *Northern* v. *United States*, *supra*, 300 F.2d 131; *Mack* v. *United States*, 274 F.2d 582 (D.C. Cir.), *cert. denied*, 361 U.S. 916 (1959); *Gilmore* v. *United States*, *supra*, 264 F.2d 44; *United States* v. *Swidler*, *supra*, 207 F.2d 47.

—revoking bail while a motion for a new trial is still pending. *Browder* v. *United States*, 168 F.2d 418 (5th Cir. 1948).

—entering a finding of guilty prior to sentencing. *In re Eskay*, *supra*, 122 F.2d at 824.

—suspending sentence but failing to place the defendant on probation. *Collins* v. *United States*, *supra*, 148 F.2d 338.

—denying a motion to nullify the defendant's election not to serve his sentence. *Shelton* v. *United States*, 223 F.2d 249 (5th Cir. 1955).

—denying a motion to require the Government to produce certain records following conviction. *Kimes* v. *United States*, 251 F.2d 458 (5th Cir. 1958).

No amount of sophistry can delineate Judge Murphy's orders as anything but interlocutory. Whether his orders be called civil or criminal in nature, the fact remains that petitioners' prior sentences have been vacated, the petitioners still await resentencing, and under established law the Government cannot appeal.

II.

The District Court's orders, even if considered final, were not appealable by the Government in this criminal case.

"In the absence of express statutory authority no appeal may be taken on behalf of the United States in any criminal case."[17] The statute giving that authority, 18 U.S.C. § 3731,[18] must be strictly construed,[19] because "appeals by the Government in criminal cases are something unusual, exceptional, not favored."[20] It is not necessary, however, for petitioners to discuss this statute in detail or to interpret it strictly in this instance, because neither the Government nor the Court of Appeals claims that the Government's appeals from Judge Murphy's orders fall within § 3731.

Even "final" orders—in the sense that they have the effect of terminating the proceeding—cannot be appealed by the Government in criminal cases unless they come within the language of § 3731. For example, in *United States* v. *Pack*, 247 F.2d 168 (3d Cir. 1957), the District Court dis-

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[17] *United States* v. *Burroughs*, 289 U.S. 159, 161 (1933). See also *United States* v. *Sanges*, 144 U.S. 310 (1892).

[18] This section is set out in full in Appendix A to this brief.

[19] *United States* v. *Borden Co.*, 308 U.S. 188, 192 (1939); *DiBella* v. *United States*, *supra*, 369 U.S. at 130.

[20] *Carroll* v. *United States*, *supra*, 354 U.S. at 400. See also *United States* v. *Nardolillo*, *supra*, 252 F.2d at 757.

missed indictments for want of prosecution, and the Government appealed. The Court of Appeals held that no appeal would lie because none was authorized by § 3731. The same result obtained in *United States* v. *Apex Distributing Co.*, 270 F.2d 747, 751-755 (9th Cir. 1959), and *United States* v. *Nardolillo*, *supra*, 252 F.2d at 757, 758, where indictments were dismissed because the Government in each instance refused to produce certain documents prior to trial, and in *Umbriaco* v. *United States*, 258 F.2d 625 (9th Cir. 1958), where a conviction on one count was set aside for insufficient evidence.

In *United States* v. *Lane*, 284 F.2d 935 (9th Cir. 1960), a defendant found guilty of importing narcotics was given a suspended sentence and placed on probation. The District Court denied the Government's motion to correct the sentence under Rule 35, and the Government appealed both from the original judgment and sentence and from the denial of the Rule 35 motion. The Court of Appeals dismissed both appeals on the ground that neither was sanctioned by § 3731.[21] See also *United States* v. *Gibbs*, 285 F.2d 225 (9th Cir. 1960).

In *DiBella* v. *United States*, *supra*, 369 U.S. at 130, this Court partially relied upon § 3731 in denying the Government the right to appeal from an order suppressing evidence on a motion filed prior to indictment, and in *Carroll* v. *United States*, *supra*, 354 U.S. 394, it relied upon § 3731 extensively in denying the Government the right to appeal from an order suppressing evidence after indictment, even

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[21] In the *Lane* case, the Government also specifically sought and was granted a writ of mandamus on the ground that probation was prohibited by the narcotics statute. See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *United States* v. *Smith*, 331 U.S. 469 (1947). *Cf. Fong Foo* v. *United States*, 369 U.S. 141 (1962). The Government, of course, did not seek mandamus in the instant case.

though the Government asserted that without the evidence it would have to dismiss the indictment.

The Government seeks to avoid the restrictions of § 3731 by arguing that petitioners' motions were not part of their criminal case. This argument will not stand analysis.

In *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949), the District Court during a criminal case barred the use of certain evidence by the Government, which then brought a civil suit in which it attempted to introduce the same evidence. The defendants argued that by failing to appeal the prior order, the Government became barred by *res judicata* from further use of the evidence, to which the Government replied that the prior order had been "interlocutory and therefore not appealable" (*id.* at 801, n. 3). The answer to the problem, said this Court, depended upon whether "the proceeding was handled by the [District] court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial" (*id.* at 802). "The motion, court opinion, and court order bore the title and number (6070) of the criminal information proceeding. During the argument colloquies took place between court and counsel which emphasized that the motion related to 'Criminal 6070'" (*ibid.*). Therefore, the prior order had been entered as part of the criminal case and was no bar to the use of the evidence in a civil case.[22]

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[22] See also *United States* v. *Shapiro*, *supra*, 222 F.2d at 839: "We think there can be no real doubt but that in the instant case the proceeding to vacate the judgment and to permit the withdrawal of the defendant's plea of *nolo contendere* was a step in the criminal case. It was filed as authorized by Rule 32 (d) of the Federal Rules of Criminal Procedure. The motion was filed in the same court where the defendant was originally convicted and docketed under the same criminal case number as the original action, No. 345-Crim. T. The hearing on the motion was then held and the matter determined by the same trial judge who had heard the original criminal case and who had entered the original judg-

And so here, too, we look to the record below to determine how petitioners' motions were presented, processed, handled and treated. Donovan was the first to file. He specifically requested that his motion be treated as a Rule 35 motion (R. 37, 38, 39). The clerk so treated it (R. 9). The Government conceded that it was a Rule 35 motion (R. 41, 45). Judge Murphy granted the motion as tendered (R. 40). The Government conceded that Judge Murphy had granted relief "under Rule 35" (R. 48). In filing for a stay, an Assistant United States Attorney pointed out in a sworn affidavit that "Under Rule 37(a)(2), Federal Rules of Criminal Procedure, an appeal by the Government may be taken within 30 days after the entry of judgment or order appealed from" (R. 47), and the Government did in fact appeal within the 30 days applicable to criminal appeals (R. 10).

When Andrews discovered that Donovan was to be resentenced, he wrote Judge Murphy requesting the same treatment (R. 49-50). He made no mention of either Rule 35 or 28 U.S.C. § 2255. Nor did the clerk in filing the motion (R. 10), or Judge Murphy in granting it (R. 58). Moreover, the Government conceded that "The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan" (R. 51). Nevertheless, completely on its own, the Government suddenly began designating Andrews' application as one "in the nature of" a § 2255 petition (R. 51). It is interesting that in Andrews' case, even though the Government continued in its notice of appeal to refer to § 2255 (R. 52), it nevertheless filed the notice within the 30 days allotted for criminal ap-

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ment of conviction." In both *Cogen* v. *United States*, *supra*, 278 U.S. at 225, and *Carroll* v. *United States*, *supra*, 354 U.S. at 404 n. 17, this Court pointed out that the "essential character and the circumstances under which it is made" determine whether a motion is part of the criminal proceeding.

peals (R. 10) and designated the notice with a criminal docket number (R. 52).

As a matter of fact, *every paper filed in this case in the District Court in regard to either petitioner and relating in any way to the question of sentencing or resentencing, including all papers filed by the Government, bore the original criminal docket number: C 149-191* (R. 1, 20, 33, 34, 35, 37, 38, 39, 40, 41, 46, 47, 48, 49, 50, 52, 53, 54, 56, 57, 59, 60).[23]

Surely if, as the Court of Appeals said, "These motions were independent motions and treatable as such" (R. 77), it is rather odd that the petitioners, the District Court, and even the Government (until very late in the game) all failed to treat them as such and in fact treated them as something very different.

Petitioners' motions were quite properly treated as Rule 35 motions, because Rule 35 was the correct method of attacking the sentences. Rule 35 provides that "The court may correct an illegal sentence at any time," and a sentence is equally as illegal if made in violation of law as it is if made in excess of the confinement specified in the governing statute. *Green* v. *United States*, *supra*, 365 U.S. 301, clearly contemplated that Rule 35 is the proper remedy when a violation of Rule 32(a) is one of the grounds of attack, because the Court held that the defendant "failed to meet his burden" of proof under Rule 35 (*id.* at 305), rather than that the District Court lacked jurisdiction over the complaint. Moreover, the Court rejected an attack on an improper jury charge with the observation that "Rule 35

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[23] This Court has pointed out that a Rule 35 motion "is a step in the criminal case and not, like habeas corpus [and therefore like a § 2255 proceeding] where relief is sought *in a separate case and record*, the beginning of a separate civil proceeding." *United States* v. *Morgan*, 346 U.S. 502, 505 n. 4 (1954) (emphasis added).

does not encompass all claims that could be made by direct appeal attacking the conviction, but rather is limited to challenges that involve the legality of the sentence itself" (*id.* at 306 n. 3).

It is "the sentence itself" and not the conviction that petitioners attack. And they do it on the basis of what the record shows and not in reliance on matters *dehors* the record. See *Heflin* v. *United States*, 358 U.S. 415 (1959). It is quite true that there is at least an implication in this Court's opinion in *Hill* v. *United States*, *supra*, 368 U.S. 424, that § 2255 rather than Rule 35 is the proper remedy here. But with great respect we suggest that this language in *Hill* fails to take into consideration the true nature of § 2255 and the consequences which would flow from its use in this type of proceeding.

Section 2255 is strictly limited by its own terms to "A prisoner in custody under sentence of a court established by Act of Congress *claiming the right to be released* * * * " (emphasis added), and this Court has held that a proceeding under § 2255 "is an independent and collateral inquiry into the validity of the *conviction*." *United States* v. *Hayman*, *supra*, 342 U.S. at 222 (emphasis added). The cases distinguishing § 2255 from Rule 35 repeatedly state that § 2255 involves a collateral attack upon the *judgment* by reason of matters *dehors* the record, whereas Rule 35 presupposes a conviction and affords a procedure for correcting a sentence shown by the record to be improper. *E.g.*, *Duggins* v. *United States*, 240 F.2d 479, 483-484 (6th Cir. 1957); *Cook* v. *United States*, 171 F.2d 567, 570-571 (1st Cir. 1948), *cert. denied*, 336 U.S. 926 (1949); *United States* v. *Rader*, 185 F. Supp. 224, 228-229 (W.D. Ark. 1960), *aff'd*, 288 F.2d 452 (8th Cir.), *cert. denied*, 368 U.S. 851 (1961).

As already pointed out, petitioners' attack is not on their judgments but on their sentences, and they do not rely upon

anything *dehors* the record (see III, *infra*). Their sentences have been shown to be invalid and improper on the face of the record, as evidenced by the fact that Judge Murphy granted their motions without taking evidence. Petitioners do not claim the right to be released (except by way of suspended sentences and probation). Their claim is that their sentences are invalid, and that they are entitled to be sentenced properly and in accordance with law.

The practical difficulties involved in treating an attack on a sentence as a § 2255 proceeding are enormous. For example, a § 2255 proceeding is independent of and separate from the criminal case. It involves a separate record. The result is that not all circumstances which bear on the sentence are necessarily included in the § 2255 record, either at the District Court level or on review by the appellate court, and the § 2255 motion is not made part of the criminal record. See *United States* v. *Hayman*, *supra*, 342 U.S. at 221 n. 36; *Taylor* v. *United States*, 282 F.2d 16, 23 (8th Cir. 1960); *Bruno* v. *United States*, 180 F.2d 393, 395 (D.C. Cir. 1950); *Burleson* v. *United States*, 205 F. Supp. 331, 333 n. 5 (W.D. Mo. 1962). *Cf. Edwards* v. *United States*, 256 F.2d 885 (D.C. Cir. 1958).

Moreover, if Rule 35 is eliminated as a method of attacking a sentence under the circumstances disclosed by this record, a whole range of illegal sentences will be made immune from collateral attack. This is so because only a sentence which is actually being served can be corrected under § 2255. A defendant cannot correct a sentence under § 2255 if he is serving the first of two consecutive sentences and it is the second sentence he is attacking;[24] if he

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[24] *Heflin* v. *United States*, *supra*, 358 U.S. at 420; *Crow* v. *United States*, 186 F.2d 704 (9th Cir. 1950); *United States* v. *Greco*, 141 F. Supp. 829 (M.D. Pa. 1956); *United States* v. *Young*, 93 F. Supp. 76, 78 (W.D. Wash. 1950), *appeal dismissed*, 190 F.2d 558 (9th Cir. 1951).

is serving a sentence which is concurrent with the sentence he is attacking;[25] if he is in custody under a state sentence and is attacking a federal sentence;[26] or if he has already served the sentence he is attacking.[27] "As the law now stands, the remedies open to a convict who is not in custody are limited to an appeal from the judgment, and to a motion made under Rules 33, 34 and 35 * * *." *United States* v. *Bradford, supra* n. 27, 194 F.2d at 201.

Even if § 2255 were technically available as an alternative remedy to Rule 35,[28] it should not be used. This Court has pointed out that "While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution * * *, the District Court should withhold relief in this collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted." *Stack* v. *Boyle, supra*, 342 U.S. at 6-7. The

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[25] *Duggins* v. *United States, supra*, 240 F.2d at 482-483; *Winhoven* v. *United States*, 209 F.2d 417, 418 (9th Cir. 1953). See *McNally* v. *Hill*, 293 U.S. 131 (1934).

[26] *Booth* v. *United States*, 209 F.2d 183 (9th Cir. 1953), *cert. denied*, 347 U.S. 923 (1954); *United States* v. *Kerschman*, 201 F.2d 682 (7th Cir. 1953); *United States* v. *Lavelle*, 194 F.2d 202 (2d Cir. 1952).

[27] *Parker* v. *Ellis*, 362 U.S. 574 (1960) (and cases there cited); *Fooshee* v. *United States*, 203 F.2d 247 (5th Cir. 1953); *United States* v. *Bradford*, 194 F.2d 197, 200 (2d Cir.), *cert. denied*, 343 U.S. 979 (1952); *Lopez* v. *United States*, 186 F.2d 707 (9th Cir. 1950).

[28] The fact that Rule 35 and § 2255 have been used interchangeably at least in some instances is illustrated by *Prince* v. *United States*, 352 U.S. 322 (1957), and *United States* v. *Williamson, supra*, 255 F.2d 512. In *Prince*, the defendant attacked his sentence under Rule 35 and was upheld on appeal. 352 U.S. at 324. In *Williamson*, the defendant attacked his sentence under § 2255 on exactly the same ground and in reliance upon *Prince*, and he was also upheld, both by the trial court and—on this point—by the appellate court. 255 F.2d at 513-514. See also *Heflin* v. *United States, supra*, 358 U.S. 415.

same applies to § 2255. This remedy should not be used to replace or defeat another remedy available as part of the criminal proceeding itself. Rather, § 2255, like habeas corpus, should be used when all other remedies fail. Here, Rule 35 is available and proper as a means of correcting the wrong that has been done.

The Government has attempted before to treat as "severable," or as "independent," matters which were really part of the criminal proceeding, and this Court has rejected the effort. See, *e.g.*, *DiBella* v. *United States*, *supra*, 369 U.S. at 125-127, 129, 132-133; *Carroll* v. *United States*, *supra*, 354 U.S. at 394-408. In no small sense, there is no criminal proceeding unless there is sentence. There could hardly be a more intimate part of the criminal proceeding than the sentence. To treat it as an ancillary matter would be to reject reality in favor of neither form nor substance.

Rule 35 was the proper remedy, resentencing was ordered under Rule 35, and the orders of resentencing were thus part of the criminal proceeding. The Government, therefore, was without statutory authority to appeal.

III.

Even assuming that the Government could appeal, the District Court was correct in holding that petitioners are entitled to be resentenced.

In this section of the brief, we assume for purposes of argument that the Court of Appeals properly had jurisdiction over the Government's appeals. The Court of Appeals was nevertheless erroneous in its holding that petitioners are not entitled to be resentenced, for the District Court's resentencing orders are amply supported by the record.

In *Hill* v. *United States*, *supra*, 368 U.S. 424, this Court held that the simple failure to comply with the formal re-

quirements of Rule 32(a) does not justify a collateral attack on a sentence by way of Rule 35 or 28 U.S.C. § 2255. At the same time, however, this Court was careful to note repeatedly that it was dealing *only* with a failure by the District Court explicitly to afford a defendant an opportunity to make a statement, and that it was *not* passing upon a situation where such a failure was accompanied by "aggravating circumstances."[29]

Similarly, in *Machibroda* v. *United States*, *supra*, 368 U.S. at 489, the Court ruled: "For the reasons stated in *Hill* v. *United States*, *ante*, p. 424, we hold that the failure of the District Court *specifically* to inquire at the time of

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[29] This Court said, for example: "The only issue presented is whether a district court's failure *explicitly* to afford a defendant an opportunity to make a statement at the time of sentencing furnishes, *without more*, grounds for a successful collateral attack upon the judgment and sentence" (368 U.S. at 426); "We hold that the failure to follow the *formal* requirements of Rule 32(a) is not *of itself* an error that can be raised by collateral attack, and we accordingly affirm the judgment of the Court of Appeals" (*ibid.*); "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not *of itself* an error of the character or magnitude cognizable under a writ of habeas corpus" (*id.* at 428); "It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred *in the context of other aggravating circumstances* is a question we therefore do not consider. We decide only that such collateral relief is not available when *all* that is shown is a failure to comply with the *formal* requirements of the Rule" (*id.* at 429). (All emphases added.)

It is thus clear that under some circumstances a collateral attack based upon a failure to comply with Rule 32(a) is permissible. This has been the interpretation accorded the *Hill* opinion by the Fourth Circuit Court of Appeals. *United States* v. *Taylor*, 303 F.2d 165, 167-168 (4th Cir. 1962).

sentencing whether the petitioner *personally* wished to make a statement in his own behalf is not *of itself* an error that can be raised by motion under 28 U.S.C. § 2255 or Rule 35 of the Federal Rules of Criminal Procedure" (emphasis added).[30]

In the case of Donovan and Andrews, however, there can be no question but that the right of allocution was denied both at the original sentencing and at the resentencing,[31] and a number of aggravating circumstances accompanied the denial of that right.

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[30] The Transcript of Record in the *Machibroda* case shows (pp. 42-43) that the defendant's attorney was specifically asked if he had anything to say:

> The Court: Does counsel for the defendant have anything to say in this matter?
>
> Mr. Schuchmann: No, Your Honor, I believe this is my fourth appearance here with the defendant.
>
> The Court: That is correct. Mr. Machibroda, I have had a complete report in your case since you were brought over here and entered your pleas.

The Court then proceeded to discuss the crime and the report, and to sentence the defendant.

[31] See Appendix B for the original sentencing and R. 20-33 for the resentencing. Following his resentencing, Andrews sought from the District Court a nullification of his election not to commence the service of his sentence and an order declaring that his sentence was effective from the date on which he was originally sentenced in 1954. The Government defeated his claims by obtaining a ruling that the Court of Appeals had never "vacated" his original sentence, and that Judge Walsh never "resentenced" him at all but merely ordered that his prior sentence remain unchanged. See *United States* v. *Andrews*, 170 F. Supp. 380, 382 (S.D.N.Y. 1958), *aff'd*, 263 F.2d 608 (2d Cir.), *cert. denied*, 360 U.S. 904 (1959). In opposing Donovan's motion for resentencing before Judge Murphy, however, the Government found it advantageous to argue quite to the contrary. An Assistant United States Attorney stated in a sworn affidavit: "Although petitioner attacks the validity of both the 1954 sentencing and the 1957 resentencing it appears clear that he is presently incarcerated solely on the basis of the judgment of conviction entered by Judge Walsh on May 29, 1957. Since petitioner was resentenced at that time, it is unnecessary to consider

(a) The most obvious such circumstance—one reaching constitutional proportions—was that Donovan, Andrews and one of Donovan's attorneys were not even present during a crucial part of the resentencing procedure.

As already noted in the statement of facts, the resentencing was to have taken place on May 15, 1957, but was deferred for five days at the request of Mr. Friedman, an attorney representing all three defendants, so that he could prepare a brief on the power of the District Court to impose less than 25-year sentences (R. 20-21). No such brief was prepared (R. 21). Instead, Mr. Friedman and the Assistant United States Attorney, Mr. Matthews, appeared before the Court on May 20 and carried on extended legal arguments dealing with the power of the Court to impose various sentences (R. 21-25). The record clearly shows that Donovan, Andrews, and Donovan's separate attorney, Mr. Healey, were absent from the courtroom during these arguments (R. 21, 25, 26).

After a recess the two defendants appeared, and Mr. Matthews presented the Government's version of the crime (R. 25-26). The record indicates that Mr. Healey did not appear until *after* this presentation had been made (see R. 26). Friedman and Healey then spoke, but neither covered in their remarks the same argument that had been made earlier out of the presence of Healey and the defendants (R. 26-29).

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any possible flaws in the original sentencing" (R. 42). The Court of Appeals seemed to agree, because it held in its opinion below that both Andrews and Donovan were "resentenced" in 1957 (R. 75). In view of the fact that petitioners were denied their right of allocution at both their original sentencing and their resentencing, and in further view of the fact that Judge Murphy *vacated* their sentences—regardless of when imposed—the point would seem to be more interesting as a lesson in Government ambivalence than important in any determination of this case.

The cases are clear that a defendant is entitled under the Due Process Clause of the Fifth Amendment and under Federal Rule of Criminal Procedure 43 to be present at every stage of the proceeding against him. For example, as early as 1884 this Court said:

> Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. [*Hopt* v. *People of Utah*, 110 U.S. 262, 264 (1884).[32]]

The rule applies to every stage of the proceeding after indictment,[33] and it has specifically been applied to the sentencing, or resentencing, procedure. Thus, in *Pollard* v. *United States*, *supra*, 352 U.S. 354, the defendant was absent when the judgment and order were entered suspending the imposition of sentence and placing him on probation. The Government and every member of this Court conceded that the judgment and order were invalid. *Id.* at 356, 360, 366 n. 3. In *Anderson* v. *Denver*, 265 Fed. 3 (8th Cir. 1920), the court held a sentence subject to collateral attack by

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[32] See also *Ball* v. *United States*, 140 U.S. 118, 131, 132 (1891); *Schwab* v. *Berggren*, 143 U.S. 442, 448 (1892); *Dowdell* v. *United States*, 221 U.S. 325, 331 (1911); *Evans* v. *United States*, 284 F.2d 393, 395 (6th Cir. 1960); *United States* v. *Brest*, 23 F.R.D. 103, 106 (W.D. Pa. 1958).

[33] *E.g.*, *Lewis* v. *United States*, 146 U.S. 370, 372 (1892) ("after indictment found, nothing shall be done in the absence of the prisoner"); *Diaz* v. *United States*, 223 U.S. 442, 455 (1912); *Price* v. *Zerbst*, 268 Fed. 72, 74 (N.D. Ga. 1920) (it is a leading principle in United States courts that "after indictment nothing should be done in the absence of the prisoner").

way of habeas corpus because the defendant had not been present. Said the court, quoting a constitutional text:

> "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment." [*Id.* at 5-6.]

In *Cook* v. *United States*, 171 F.2d 567, 569 (1st Cir. 1948), *cert. denied*, 336 U.S. 926 (1949), the Court of Appeals vacated an order which was entered in the defendant's absence and which added a fine to his sentence, even though it was the defendant himself who had requested that the fine be added. Again, in *Downey* v. *United States*, 91 F.2d 223 (D.C. Cir. 1937), the court recognized that the defendant's presence was necessary at proceedings to determine whether his sentences were to run concurrently or consecutively. The Court stated:

> Proceedings in the absence of the appellant to correct the record would have been improper, since the ultimate question involved, the extent of valid imprisonment to which he might be subjected, was one of vital legal interest to him. [*Id.* at 227.]

Similarly, in *Montgomery* v. *United States*, 134 F.2d 1, 2 (8th Cir. 1943), the Court of Appeals vacated orders of the District Court which amended court records to show that sentences were to run consecutively and which were entered in the absence of the defendants, and in *Crowe* v. *United States*, 200 F.2d 526 (6th Cir. 1952), the Court of Appeals held invalid a District Court order which amended

and modified a probation order in the absence of the defendant. In the latter case, the Court of Appeals ruled: "A leading principle that pervades the entire law of criminal procedure is that, after indictment is found, nothing shall be done in the absence of the prisoner." *Id.* at 528.

In the instant case, the absence of petitioners was particularly serious, and it bore directly on their right of allocution. If they were not told about the argument which took place in their absence, they of course had no opportunity to refute, rebut, correct or enlarge upon what was said either in their own behalf or by the Government. On the other hand, if they were informed that an argument had taken place in their absence, they may very well have assumed that much was said on their behalf which in fact was not said. It may be, in fact, that knowledge of an argument out of their presence dissuaded them from speaking up for fear of repeating or contradicting something that had already been said on their behalf.

The absence of Mr. Healey was also particularly serious, because even though Mr. Friedman said he was representing all three defendants,[34] it is worth noting that he did not speak for Donovan in Healey's presence (see R. 26-28), and he nowhere mentioned Donovan in Healey's absence (R. 21-24), though he conceded that the "defendants are differently situated" (R. 23). Healey never had an opportunity to argue the law, as Friedman had done, but rather confined himself to a plea for mercy (R. 28-30). He nowhere mentioned the argument Friedman had made to the effect that the Court should give a light sentence on Count One and suspend sentence on Count Two; instead, he simply asked the Court to place Donovan on probation (R. 29, 30).

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[34] Mr. Friedman had represented only Mr. Cohen at the trial (see list of appearances in Original Transcript on file with this Court).

Clearly, petitioners were seriously prejudiced when an important part of the sentencing procedure—a part so vital that it had been postponed five days to allow Friedman a chance to prepare for it—was held out of their presence and out of the presence of Donovan's attorney. A right to be present at the imposition of sentence is meaningless unless a defendant has been present at each stage of the proceedings designed to determine what that sentence shall be. The absence of petitioners and Healey was more than an "aggravating circumstance"; it was the denial of a fundamental right.

(b) The judge who resentenced petitioners had a serious misconception as to the facts of the crime.

The trial had been held almost two and a half years prior to the resentencing and had lasted five days (R. 2, 20). By the time of the resentencing in 1957, Judge Walsh had developed the idea that Andrews was on the truck with Donovan when the crime was committed (R. 31, 32), whereas actually Andrews was away from the truck and unarmed during the holdup. *Supra*, n. 6. Clearly, if Andrews had been given an opportunity to speak in his own behalf, he would have corrected this error and placed himself more nearly in the category of Cohen, who received a suspended sentence, than in that of Donovan, who received a sentence of 25 years (R. 30-34). Misinformation on the part of the District Judge was one of the factors specifically cited by this Court in *Hill* v. *United States*, *supra*, 368 U.S. at 429, as possibly calling for a different result than prevailed there.

(c) Unlike the record in *Green* v. *United States*, *supra*, 365 U.S. 301, the record here directly refutes any inference that either Andrews or Donovan was asked whether he had anything to say in his own behalf. In *Green*, the District

Court asked, "Did you want to say something?," and although the defendant's attorney answered, a majority of this Court felt that the question may well have been directed to the defendant. 365 U.S. at 304-305. Here, however, the only question asked by the District Court even remotely in point was, "Is there anything you want to say now?," and this question was answered not by the defendants or their attorneys but by the Assistant United States Attorney (R. 25).[35]

The above facts, combined with others,[36] quite clearly make out a case requiring resentencing. Particularly apt is the observance in *Green* v. *United States*, *supra*, 365 U.S. at 304, that "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself"—a statement so obvi-

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[35] With all due deference to the Court of Appeals, we are obliged to point out that the opinion below misstates the facts in this regard. The Court of Appeals opinion states: "The undisputed facts are that when the case was called for sentence Donovan was present with his retained counsel; that the court inquired: 'Is there anything you want to say now?'; and that thereupon in the presence of Donovan *his counsel* addressed the court at length" (R. 75, emphasis added). This simply is not so. The record clearly shows that Mr. Matthews, the Assistant United States Attorney, answered the District Court's question, and that Donovan's attorney did not speak until Matthews had concluded. It is not clear whether the Court of Appeals thought Matthews was Donovan's attorney, or whether it was simply adopting a similar statement of the facts submitted by an Assistant United States Attorney in his "Affidavit in Opposition to Motion for Resentencing," filed June 19, 1961 (R. 41-45; see particularly R. 43-44).

[36] For example, the petitioners had been denied their right of allocution at the original sentencing (Appendix B), so that while the District Court may well have felt that they had already said everything there was to say in their own behalf, this was in fact their first opportunity to speak.

Also, Donovan had a criminal record (R. 28), so it was particularly important, as the four dissenters pointed out in *Hill* v. *United States*, *supra*, 368 U.S. at 434-435, that he be allowed to speak to his prior convictions.

ously true that three courts of appeals[37] and the Government[38] were persuaded, until *Hill* was decided, that Rule 32(a) guaranteed a right to speak that was personal to the defendant. Here it was particularly important for the defendants to speak for themselves, because the District Court had before it at least one presentence report (R. 23, 26), which was required to show, in addition to any prior criminal record, "such information about [the defendant's] characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence, or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court" (Federal Rule of Criminal Procedure 32(c)(2)). The record indicates that counsel for neither side had seen this report (R. 23, 26). It was therefore essential that the men from whom much of the information in the report undoubtedly was drawn be allowed to speak from their own personal knowledge of the salient facts. That the District Court might well have been persuaded by what they had to say is indicated by the fact that the third defendant, Cohen, who was described to the jury by the prosecutor as "worse than the other two" defendants (Original Transcript on file with this Court, 662), was placed on probation (R. 31).

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[37] *United States* v. *Byars*, 290 F.2d 515 (6th Cir.), *cert. denied*, 368 U.S. 905 (1961); *Domenica* v. *United States*, 292 F.2d 483 (1st Cir. 1961); *Jenkins* v. *United States*, 293 F.2d 96 (5th Cir. 1961), *cert. denied*, 370 U.S. 928 (1962). *Cf.* the post-*Hill* case of *United States* v. *Bebik*, 302 F.2d 335 (4th Cir. 1962).

[38] *Van Hook* v. *United States*, 365 U.S. 609 (1961); Government's Memorandum in Reply to Petition for Certiorari, p. 12. The colloquy that occurred at sentencing in *Van Hook* is quoted in the Appendix certified to the Court in that case, pp. 31-32.

CONCLUSION

The Court must remember that in this case the Government is not attempting to appeal a lesser sentence, an illegal sentence, a failure to sentence, or an acquittal. It is attempting to appeal the *fact* of resentencing, in advance of the event. Such an appeal finds support nowhere in the cases, and the Court of Appeals has cited none. An affirmance by this Court not only would mark a radical departure from prior case law but would throw all of the prior "finality" cases into doubt.

In the meantime, one of the most important rights in the criminal field—the right to be sentenced properly and in accordance with law—is being denied these petitioners, and the amount of time they could be spending on probation rehabilitating themselves is diminishing. The judgment of the Court of Appeals should be promptly reversed.

Respectfully submitted,

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Appointed by the Court

APPENDIX A

Constitutional Provision, Statutes and Rules Involved

Amendment V, United States Constitution

No person shall * * * be deprived of life, liberty or property, without due process of law * * *.

62 Stat. 797, 18 U.S.C.A. § 2114

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

72 Stat. 701, 18 U.S.C.A. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

62 Stat. 967, as amended, 28 U.S.C.A. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that

the remedy by motion is inadequate or ineffective to test the legality of his detention.

62 Stat. 844, as amended, 18 U.S.C.A. § 3731

Appeal by United States.

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opin-

ion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Rule 32, Federal Rules of Criminal Procedure

Sentence and Judgment.

(a) SENTENCE. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) JUDGMENT. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial

condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 35, Federal Rules of Criminal Procedure

Correction or Reduction of Sentence. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 43, Federal Rules of Criminal Procedure

Presence of the Defendant.

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment

for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

APPENDIX B

Proceedings Before Judge Walsh on December 31, 1954, Original Transcript on File With This Court, Pages 647-650a

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded:

You say you find all three defendants guilty on all three counts.

(The jury was polled.)

(Each juror answered in the affirmative.)

Mr. Frank Healey [attorney for Mr. Donovan]: At this time, your Honor, may I respectfully move—

The Court [Judge Walsh]: Just a minute. I will excuse the jury.

Mr. Foreman, ladies and gentlemen of the jury: I thank you again for your conscientious service. I think your verdict is a very conscientious one and I think there is ample basis for it in the record, and I know that you spent a good deal of time in deliberating and coming to the conclusion that you have. On behalf of the community we thank you. We will excuse you now with the thanks of the Court.

(Jury retires.)

Mr. Frank Healey: At this time, your Honor, on behalf of all defendants may I respectfully move to set aside the jury verdict as being contrary to law and contrary to the weight of the evidence.

The Court: I will deny your motion.

Mr. Frank Healey: That is on behalf of all three defendants.

The Court: Yes. In view of the state of the law I don't see any point in postponing sentence because I think very little—

Mr. Jaffe [Assistant United States Attorney]: If your Honor wishes, it is satisfactory to the Government.

The Court: I think we might as well hear whatever there is to be said on the question of sentence right now. I have relatively little discretion.

Mr. Frank Healey: I have nothing.

Mr. Leo Healey [attorney for Mr. Andrews]: I have nothing, Judge.

Mr. Friedman [attorney for Mr. Cohen]: I don't know. I am not completely satisfied on the state of the law, your Honor. I think in view of what is involved here we should have an opportunity to study it and see if anything can be said with respect to the sentence, unless your Honor is satisfied.

The Court: No. I am not satisfied. In view of the verdict, I mean on count 2, I think the sentence is mandatory, and I don't think I have any power, for instance, to suspend on that, and sentence on the other counts. I don't think I have that power. I will be glad to have any further research that you care to do on it. I would impose sentence now, and if you can convince me that I have power further than I have, that I think I have, I will be glad at any time in the next week or so to consider your view.

Mr. Friedman: Very well.

The Court: I will sentence the three defendants, the sentence on count 2 is mandatory, twenty-five years, and I sentence you to be committed to the custody of the Attorney General for a period of twenty-five years.

Now I am going to also sentence you on the other counts, but those sentences will run concurrently, you will serve all at the same time. I won't extend the period—

Mr. Jaffe: Your Honor, may I approach the bench?

The Court: Yes.

I will impose sentence on count 3 of five years on each defendant to run concurrently with the sentence on count 2. I will not impose any separate sentence on count 1.

Mr. Friedman: Will your Honor, on behalf of the defendant Cohen, entertain an application of bail pending appeal?

The Court: No. In view of the severity of the sentence I see no basis—what was the bail that he was under pending trial?

Mr. Friedman: He was held in $50,000 bail.

The Court: Well—

Mr. Friedman: Your Honor must recognize that in a case of this kind, it being rather unusual, certainly with respect to the defendant Cohen there are various questions of law which are arguable.

The Court: Well, Mr. Friedman, I recognize that as to the defendant Cohen there may be questions of law that you want to argue. On count 3 I see no substantial question whatever. In other words, regardless of what points you may raise as to count 2, I see no basis, substantial basis, or any substantial question as to count 3, inasmuch as the sentence for Cohen is five years under Count 3, regardless of his guilt under count 2, and I don't see any point of continuing bail.

Mr. Friedman: May I say that all the questions of law that have been raised in the case with respect to the admissibility of evidence, with respect to the requests to charge, exceptions to the charge, apply to the third count just as they do to every other count.

The Court: I will deny your application pending appeal. I don't think there is any substantial question under count 3. I will leave it to you to do what you can as to the sufficiency of the evidence under count 2 But that to me is not a question to be raised at this time because I think there is no substantial question as to count 3.

Mr. Friedman: Very well.

The Court: All right.

(Trial concluded.)